

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jun 26, 2019

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RUSSELL DUANE MCNEIL,

Petitioner,

v.

MAGGIE MILLER-STOUT,

Respondent.

No. 2:13-CV-3065-JTR

REPORT AND RECOMMENDATION
TO DISMISS PETITION WITHOUT
PREJUDICE

BEFORE THE COURT is Petitioner's 28 U.S.C. § 2254 habeas corpus petition filed on June 25, 2013. ECF No. 1. Petitioner is represented by attorney Lenell Nussbaum; Respondent is represented by Assistant Attorney General Alex A. Kostin. Petitioner, who was a juvenile when sentenced to life without parole in Washington State, challenges his sentence as cruel and unusual punishment under *Miller v. Alabama*, 132 S. Ct. 2455 (2012). ECF No. 1 at 5. The parties have not consented to proceedings before a magistrate judge.

During the pendency of the instant action, the Washington State Legislature has enacted a statute establishing a new procedure for re-sentencing prisoners, like Petitioner, who are serving life without parole sentences for an offense committed while under the age of 18. *See* ECF No. 33 at 2. Petitioner is scheduled to be

1 resentenced pursuant to this newly established procedure. *Id.* In light of this new
2 state statutory procedure and the pendency of a new sentencing hearing for
3 Petitioner, the parties have filed the instant “Joint Motion to Dismiss Without
4 Prejudice.” ECF No. 33.

5 Based on the foregoing, **IT IS HEREBY RECOMMENDED** as follows:

6 1. The parties’ “Joint Motion to Dismiss Without Prejudice,” **ECF No.**
7 **33** be **GRANTED**.

8 2. Petitioner’s 28 U.S.C. § 2254 petition, ECF No. 1, be **DISMISSED**
9 **WITHOUT PREJUDICE**.

10 **OBJECTIONS**

11 Any party may object to a magistrate judge’s proposed findings,
12 recommendations or report within **fourteen (14)** days following service with a
13 copy thereof. Such party shall file written objections with the Clerk of the Court,
14 and serve objections on all parties, specifically identifying the portions to which
15 objection is being made, and the basis therefor. Any response to the objection
16 shall be filed within **fourteen (14)** days after receipt of the objection. Attention is
17 directed to FED. R. CIV. P. 6(d) which adds additional time after certain kinds of
18 service.

19 A district judge will make a *de novo* determination of those portions
20 objected to and may accept, reject, or modify the magistrate judge’s determination.
21 The judge need not conduct a new hearing or hear arguments and may consider the
22 magistrate judge’s record and make an independent determination thereon. The
23 judge may, but is not required to, accept or consider additional evidence, or may
24 recommit the matter to the magistrate judge with instructions. *United States v.*
25 *Howell*, 231 F.3d 615, 621 (9th Cir. 2000); 28 U.S.C. § 636(b)(1)(B) and (C), FED.
26 R. CIV. P. 72.

27 A magistrate judge’s recommendation cannot be appealed to a court of
28 appeals; only the district judge’s order or judgment can be appealed.

1 **IT IS SO RECOMMENDED.** The Clerk of the Court is directed to enter
2 this Report and Recommendation, forward a copy to counsel and Petitioner and
3 **SET A CASE MANAGEMENT DEADLINE ACCORDINGLY.**

4 DATED June 26, 2019.

A handwritten signature in black ink, consisting of a stylized 'M' followed by a series of loops and a horizontal stroke at the end.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE